In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5875

NAVIGAZIONE LIBERA TRIESTINA,
a Corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT

The amended complaint set out in the transcript (Tr. 13) sets out the fact that the plaintiff is an Italian Steamship Company and operates the "Cellina"; that Giovanni Prigl is the master of the vessel, and

that two citizens of Italy were bona fide seamen on said vessel. Paragraph VI of the amended complaint (Tr. 15) alleges that these two seamen were on board when the vessel left Vancouver, British Columbia, and from there came on the vessel to Seattle; that no one from the Immigration Department inspected the crew until the 18th day of March, at ten o'clock A. M., when Inspector Rafferty came on board and made a brief inspection and issued a blanket order of detention. The complaint alleges further that this blanket order of detention was improper, and that the Master refused to accept service of the same, and that Rafferty left the vessel immediately after issuing the blanket order.

Paragraph VII alleges that despite the care of the plaintiff, two seamen escaped after the blanket order was issued, and further alleges that the plaintiff does not now know the whereabouts of the two seamen. Paragraph VIII of the complaint attacks the blanket order and alleges that said order was "arbitrary" and further that they (the two seamen) did not have an opportunity of proving to the Inspector that they had a right to go to port, further alleging that that right to leave the vessel had been given to them in the Port of Los Angeles and in the Port of

San Francisco by the Immigration Inspectors there.

Paragraph IX of the complaint sets out that the subsequent fine of Two Thousand ($2,000) Dollars for allowing the seamen to escape, which was imposed upon the vessel itself, was "unlawful" and "arbitrary" and "without authority" and prays for a return of the Two Thousand Dollars.

The Government demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action and Judge Cushman sustained the demurrer.

ISSUE

The sole question before this Court is whether a general allegation in a complaint to the effect that the action of the Inspector was arbitrary and illegal and that the fine imposed by the Collector of Customs was "arbitrary" and "illegal" and "without authority" and "without justification," constitutes sufficient facts to make the complaint demurrer proof.

ARGUMENT

The complaint does *not* state facts sufficient to constitute a cause of action. The Statute referred to in the complaint 43 Stat. 164; 8 U. S. C. A. Sec. 167, upon which this fine was levied, is as follows:

> "(a) Detention of seamen on board vessel until after inspection; detention or deportation; penalty; clearance to vessels. The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seamen on board after such inspection or to deport such seamen if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

> (b) Prima facie evidence of failure to detain or deport. Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or by the Secretary of Labor."

The position of the appellant is hard to determine, first alleging in Paragraph VIII of its complaint (Tr. 19) that the inspection of the Inspector Rafferty did not constitute an inspection, and then seeking, by the fact that this inspection was not proper, to justify the escape of two aliens. Assuming that the position of the appellant is correct, that this was not a proper inspection, then it must remain clear that according to Section 167 (a) above set out of the Immigration Act, it was the duty of the master to detain the seamen until a proper examination was given. The complaint admits that the seamen escaped and clearly establishes by its own pleading the liability under the Act.

Let us examine the amended complaint. The appellant admits in Paragraph VI (Tr. 17) that Inspector Rafferty's inspection was not proper, and further that the master of the vessel refused to accept the

blanket order of detention. He clearly then did not regard the inspection as a proper one, and if the inspection was not a proper one, the master had no right to let the seamen go, the statute placing upon them an absolute liability in case such seamen do escape or leave the vessel before a proper inspection. It is argued in the brief that the master had no other remedy, there was nothing else that the could do, and that they escaped from no cause of his own. It must be obvious to this Court in answer to this contention that the master could have insisted upon a proper inspection if the first inspection was wrong or unlawful, as the appellant states it to be. This, he did not do and was, of course, correctly penalized. It cannot be argued in one breath that the inspection was unlawful and, therefore, not recognized, and then in another breath urge that the seamen were detained until the inspection and that they have subsequently escaped.

It is further urged in the brief of the appellant that the two seamen had a right to enter the United States. They set out the fact that they were allowed entrance through the Port of Los Angeles and the Port of San Francisco, and that it was illegal and arbitrary to refuse them this right in Seattle. In this respect we call the Court's attention to the case of The

Limon, District Court, 14 F. (2) 145, Circuit Court decision in 22 F. (2) 270. This case was an action to collect penalties for violation of Sec. 33 of the Immigration Act of 1917, an act similar to the one in which the penalties in the instant case were instituted. That Act, Sec. 33, made it unlawful for a master of a vessel arriving in the United States from any foreign port to pay off or discharge any alien seamen unless duly admitted under the Immigration laws. The master of the vessel "The Limon" paid off two seamen after having received a blanket detention order to detain such alien seamen on board the vessel, which order like the present one did not specially name the seamen. The Circuit Court says on page 272 of its decision:

> "It is conceded by the appellant that it did not comply with the regulations or give any notice to the Secretary of Labor. Nor does the right of a seaman to shore leave excuse the appellant from its breach of section 33." * * *
>
> "A suggestion that no notice was given to detain the particular seamen is of no force, because section 33 does not require a notice, as does section 32. A notice to detain aliens is a direction to prevent them from entering the country."

The appellant has pleaded mere conclusions of law and

> " a demurrer on the ground of insufficient facts to constitute a cause of action or defense, will lie to such a pleading."

31 Cyc. 280; See cases cited in Note 6, 31 Cyc. 281.

There are a number of Federal cases which announce the rule that pleading that the action of an individual was "arbitrary," "unjust" and "unlawful" are mere conclusions of law. There is the Silberschein case vs. the United States, 266 U. S. 221, which case involves the action of a director of the Veterans' Bureau in determining compensation under the War Risk Insurance Act. On page 225, the Supreme Court of the United States stated in the Silberschein case:

> "The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was misconstrued, or where the action of the executive officer was arbitrary or capricious."

In *United States vs, Meadows*, 32 F. (2) 440, the Federal District Court was held to have no jurisdiction in a suit against the United States to reinstate a veter-

an's lapsed insurance policy. The Court held on page 441, and quotes the decision in the case of *Silberschein vs. United States*, 266 U. S. 221:

> "It has been repeatedly determined that the grant of power given to the Director by section 2 of the act of 1921, to decide questions of fact, cannot be challenged, unless the controversy falls within section 19 of the act of 1924, as amended by act of 1925 (38 USCA Sec. 445), or unless such decision is 'wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious.' *United States v. Williams*, 49 S. Ct. 97, 73 L. Ed.—decided January 2, 1929; *Silberschein v. United States*, 266 U. S. 221, 225, 45 S. Ct. 69 (69 L. Ed. 256); *Armstrong v. United States*, 16 F. (2) 387, 389, this court; *United States v. Edwards*, 23 F. (2d) 477, 479, this court. There is no allegation in this petition that the action of the Director upon this matter was wholly unsupported by evidence or wholly dependent upon a question of law or clearly arbitrary and capricious. The only allegation is that the Director acted 'erroneously and contrary to the terms of the War Risk Insurance Act and amendments thereto.' In *Silberschein v. United States*, 266 U. S. 221, 225, 45 S. Ct. 69, 71 (69 L. Ed. 256), the Supreme Court stated that:
>
> " 'The general allegations of the petition that the Director's decision was arbitrary, unjust and unlawful, and a usurpation of power, are merely legal conclusions. Clearly, the petition does not present a case where the facts are undisputed and the only conclusion properly to be drawn is one favorable to petitioner, or where the law was mis-

construed, or where the action of the executive officer was arbitrary or capricious.'

"Obviously, the allegations in the present petition fall far short of charging any such action upon the part of the Director as would give this court jurisdiction. Therefore, the court was without jurisdiction unless such is given by section 19 of the act of 1924."

The complaint of the appellant likewise alleges mere conclusions of law. Paragraph IX of the amended complaint (Tr. 22):

"The said fine in the sum of Two Thousand Dollars was 'arbitrarily' and 'illegally' imposed."

Paragraph VIII:

"The said 'arbitrary' blanket detention order."

We do not quarrel with the cases of the appellant cited in its brief, which show that the plaintiff has the right to sue the Government for the return of fines imposed, but said complaint should not be based upon legal conclusions, but must plead facts. Counsel cites the case of *McCarl vs. United States*, 30 F. (2) 561, and argues that this case is in point. The circumstances of the McCarl case clearly show that there was an error of law made by the Collector and that after said

error was made and the fine of Seven Thousand Dollars imposed, the Collector realized his mistake and conceded that the money should be refunded to the Steamship Company. The Commissioner General of Immigration and the Secretary of Labor realized, as may be gathered from the reading of page 562 of the opinion, that the fine was collected through error of Government officers. Whereupon, they authorized and directed that it be refunded, but the question decided in the case was a question of mandamus and does not go into the merits of the Immigration Act. In the instant case no admission of error in assessment is made.

It must seem clear to this Court, as it did to the lower Court when sustaining the demurrer to the amended complaint, that,

First, the appellant has no right to justify the escape of alien seamen on the grounds that an order is arbitrary and illegal. The liability rests on them to retain said seamen even without a detention order until a proper examination is made. The fact that the master of the vessel admits in the pleadings that he refused to accept the detention order shows that he himself did not regard this as a proper examination.

Second, the complaint sets out conclusions of law and does not state facts sufficient to constitute a cause of action.

It is respectfully submitted, that the ruling of the lower court be affirmed.

Respectfuly submitted,
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JEFFREY HEIMAN,
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